December 17, 1990

MEMORANDUM

TO: The Honorable Robert A. Alm
Director of Commerce and Consumer Affairs

ATTN: Sharon On Leng, Supervising Attorney
Regulated Industries Complaints Office

FROM: Hugh R. Jones, Staff Attorney

SUBJECT: Disclosure of Requests to Inspect and Copy Government Records

This is in reply to a letter dated September 11, 1990, from Sharon On Leng, requesting an advisory opinion from the Office of Information Practices ("OIP") concerning the above-referenced matter.

ISSUE PRESENTED

Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), government agencies must make available for public inspection and copying, an individual's written request to inspect or copy a government record.

BRIEF ANSWER

Although agencies are not required by the UIPA to disclose government records which would result in a clearly unwarranted invasion of personal privacy, see section 92F-13(1), Hawaii Revised Statutes, this UIPA exception only applies to information in which an individual has a significant privacy interest.

Based upon legal authorities interpreting the provisions of

the federal Freedom of Information Act, and an opinion of the Texas Attorney General involving closely analogous facts, we conclude that as a general rule, individuals do not have a significant privacy interest in the fact that they have made a records request to a government agency under part II of the UIPA. Part II of the UIPA governs access to government records by members of the public; part III of the UIPA governs an individual's access to that individual's "personal record[s]."

However, because we have previously concluded that as a general rule, the disclosure of an individual's home address would constitute a clearly unwarranted invasion of personal privacy under the UIPA, an agency should delete this information before disclosing an individual's written request under the freedom of information provisions of part II of the UIPA.

Lastly, for similar reasons, we conclude that requests to the Office of Information Practices ("OIP") for advisory opinions under section 92F-42(2) and (3), Hawaii Revised Statutes, are not, as a general rule, protected from disclosure under part II of the UIPA. Of course, if a request to the OIP contains information that in and of itself is protected by one of the exceptions set forth at section 92F-13, Hawaii Revised Statutes, such information should be segregated from the request before the public may inspect and copy the same.

FACTS

Pursuant to the provisions of part II of the UIPA, entitled "Freedom of Information," a member of the public requested the Department of Commerce and Consumer Affairs' Regulated Industries Complaints Office ("RICO") to disclose whether any complaints had been filed with the RICO against a property management corporation and its president. The corporation and its president are licensed as real estate brokers under chapter 467, Hawaii Revised Statutes.

In response to this request, the RICO mailed the UIPA requester a description of the substance of all complaints against the licensees and the dispositions of the complaints. See Haw. Rev. Stat. .. 92F-11(b) and 92F-14(b)(7) (Supp. 1989).

Sometime after the RICO provided the requester with a copy of the licensees' complaint history, it was posted throughout a residential condominium that was managed by the licensees, after information identifying the recipient of the letter had been deleted.

By letter dated September 10, 1990, the licensees requested the RICO to disclose the identity of the person who made the request for a copy of their complaint history. Because of its uncertainty over whether the identity of a requester under part II of the UIPA is protected from disclosure under the UIPA's personal privacy exception, the RICO requested an advisory opinion from the OIP concerning whether this information must be made available for public inspection and copying.

DISCUSSION

Section 92F-11, Hawaii Revised Statutes, sets forth an agency's affirmative obligations under the UIPA, and provides in pertinent part, "[e]xcept as provided in section 92F-13, each agency upon request by any person shall make government records available for inspection and copying during regular business hours." Haw. Rev. Stat. . 92F-11(b) (Supp. 1989) (emphasis added). Based upon this UIPA provision, we have previously noted that for requests made under part II of the Act: 1) a requester's identity generally has no bearing upon the merits of the individual's request, and 2) requesters are generally not required to identify themselves when making a request to inspect a government record which is "public." See OIP Op. Ltr. No. 90-29 (Oct. 5, 1990).

Under the facts presented here, the RICO received a written request from a person for a copy of a government record that was "public" under part II of the UIPA. In order to receive a copy of this government record, the requester provided the RICO with a name and mailing address to enable it to dispatch a copy. Accordingly, we must determine whether the identity of the record requester, as contained within a government record maintained by the RICO, is subject to an applicable statutory exception. If not, the record requester's identity is public under section 92F-11(a) and (b), Hawaii Revised Statutes.

In reviewing the UIPA's exceptions to required agency disclosure, the only exception that would potentially apply to the identity of a requester under part II of the UIPA, is that which does not require an agency to disclose "[g]overnment records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy." Haw. Rev. Stat. . 92F-13(1) (Supp. 1989).

Under the UIPA's personal privacy exception, only "natural persons" have a cognizable privacy interest. See Haw. Rev. Stat. ..

92F-3 and 92F-14(a),(b) (Supp. 1989) ("individual means natural person"). Thus, UIPA requesters who are other than natural persons, such as corporations, partnerships, and government agencies, do not have a privacy interest in the fact that they have made a request under part II of the UIPA. Additionally, as a threshold matter, the UIPA's personal privacy exception only applies to information in which an individual has a "significant" privacy interest. See S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw. S.J. 689, 690 (1988); H.R. Conf. Comm. Rep. No. 112-88, 14th Leg., 1988 Reg. Sess., Haw. H.J. 817, 818 (1988) ("[o]nce a significant privacy interest is found, the privacy interest will be balanced").

In section 92F-14(b), Hawaii Revised Statutes, the Legislature set forth examples of information in which a person is deemed to have a "significant privacy interest." This statutory enumeration is silent as to information which identifies an individual as having made a request under part II of the UIPA. However, the commentary to section 3-102 of the Uniform Information Practices Code, upon which the UIPA was modeled, indicates that this "enumeration is not intended to be exhaustive." Indeed, the legislative history of the UIPA indicates that "case law under the Freedom of Information Act should be consulted for additional guidance." S. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1093, 1094 (1988).

Based upon our research, there is a paucity of reported cases under the federal Freedom of Information Act, 5 U.S.C. . 552 (Supp. 1989) ("FOIA"), addressing the question presented by this opinion. However, in Agee v. Central Intelligence Agency, 1 Government Document Service para. 80,213 at 80,532 (D.D.C. 1980), the court held that under the FOIA's personal privacy exemption, Exemption 6, "FOIA requesters can have no general expectation of privacy that their names will be kept private." In fact, in most cases the release of the name of a FOIA requester would not cause even the minimal invasion of privacy required to trigger the balancing test of Exemption 6. See, e.g., Strauss v. IRS, 516 F. Supp. 1218, 1223 (D.D.C. 1981).

Similarly, the United States Department of Justice's Office of Information and Privacy has stated that "[i]t would take an extraordinarily rare and compelling situation for the mere identification of a person or entity as a FOIA requester of particular records to rise to the level of implicating a privacy

interest . . . protectible under the FOIA." U.S. Department of Justice, Office of Information and Privacy, FOIA Update at 6 (Winter 1985).

Because there is only one reported case under FOIA that directly addresses this issue, additional guidance may be supplied by authorities who have considered this issue under the open records statutes of other states. Unfortunately, our research has disclosed no reported state court decision that has addressed the issue presented. However, the Texas Attorney General has addressed an analogous situation, regarding whether a letter to the attorney general's office, requesting a decision under the Texas Open Records Act, is subject to required agency disclosure.

In Texas Open Records Decision No. 459 (Feb. 17, 1987), in response to an open records request from a member of the public, a city attorney made a request to the attorney general's office for a determination whether certain government records were subject to public inspection. The Texas Attorney General, responding in an informal letter, concluded that the information requested was exempt from disclosure. Thereafter, the record requester asked the city attorney's office to disclose a copy of its letter to the attorney general requesting a legal opinion under the Texas Open Records Law.

Noting that it sends copies of requests for opinions to interested parties who may wish to brief the issues presented for determination, the Texas Attorney General concluded that "we generally regard as a public record [agency] letters requesting Open Records Decisions, including any arguments for withholding information under the act." Texas Open Records Decision No. 459 at 2. However, the Texas Attorney General also concluded that if a request for an opinion contained information protected from disclosure under the state's open records law, or information in dispute, an agency need not disclose the same.

We are persuaded by the above authorities that only in rare and compelling situations does an individual have a significant privacy interest in the fact that the individual has made a request to an agency under part II of the UIPA. Therefore, we conclude that as a general rule, an agency's disclosure of the fact that an individual has made a request for a government record under part II of the UIPA would not "constitute a clearly unwarranted invasion of personal privacy." Haw. Rev. Stat. § 92F-13(1) (Supp. 1989).

However, because we have previously opined that the disclosure of such information as an individual's home address and home telephone number would be "clearly unwarranted" under section 92F-13(1), Hawaii Revised Statutes,[1] this information should be deleted from any correspondence to an agency requesting to inspect government records, before the correspondence is made available for inspection and copying by the public.

Furthermore, like the Texas Attorney General, the OIP concludes that requests to the OIP for advisory opinions concerning access to government records under part II of the UIPA are not, as a general rule, protected from disclosure under the UIPA. However, as noted in Texas Open Records Decision No. 459 at 1, if such a request "actually contains information that is in dispute," or if a request contains information protected by a UIPA exception to public access, the OIP shall segregate such information from a request before making it available for inspection and copying.[2]

For example, in OIP Op. Ltr. No. 90-5 (Jan. 31 1990), we declined to publish the name of the person who requested the OIP

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[1]See OIP Op. Ltr. Nos. 89-13 (Dec. 12, 1990); 89-16 (Dec. 27, 1990); 90-10 (Feb. 26, 1990); 90-30 (Oct. 23, 1990).

[2]We conclude that where a request for an OIP advisory opinion pursuant to section 92F-42(2) or (3), Hawaii Revised Statutes, includes information that is actually in dispute, or that is the subject of a claimed exception, the OIP's disclosure of that information would result in the "frustration of a legitimate government function" under section 92F-13(3), Hawaii Revised Statutes. Agencies and members of the public would be significantly deterred from seeking advisory opinions concerning their rights, duties, and responsibilities under the UIPA, if the OIP routinely made the disputed information available for inspection, and as a result, the OIP's performance of its statutory duties would be frustrated. However, where a request for an advisory opinion does not actually contain disputed information, or information that is itself subject to a UIPA exception to public access, such request will be made available for inspection and copying as required by section 92F-11(a) and (b), Hawaii Revised Statutes.

to render an advisory opinion,[3] on the basis that it would identify the requester as a person who allegedly committed an act of child abuse. Under the circumstances presented in that opinion, we concluded that the disclosure of the opinion requester's identity would constitute a clearly unwarranted invasion of personal privacy, where no civil or criminal charges resulted from the requester's alleged conduct. Accordingly, unless an OIP advisory opinion request contains information that is actually in dispute, or that is itself subject to an UIPA exception, the OIP shall make the advisory opinion request available for inspection and copying.

Lastly, although we believe that an individual does not, as a general rule, have a significant privacy interest in the fact that the individual has made a request to inspect or copy a government record under part II of the UIPA, we would not necessarily reach the same conclusion with respect to the identities of individuals who have made requests to inspect, copy, correct, or amend their "personal records" under part III of the UIPA, sections 92F-21 through 92F-28, Hawaii Revised Statutes. Because this issue is outside the scope of the facts presented here, it would not be appropriate to address this question in the absence of a more concrete factual setting. We do note, however, that the U.S. Department of Justice has generally concluded that individuals have a protectible privacy interest, under the FOIA's personal privacy exemption, in the fact that they have made a request to inspect their own records under the Federal Privacy Act, 5 U.S.C. . 552a (Supp. 1989). See U.S. Dep't. of Justice, Office of Information and Privacy, FOIA Update at 6 (Winter 1985).

CONCLUSION

We believe that as a general rule, requesters under part II of the UIPA do not have a significant privacy interest in the fact that they have requested to inspect or copy government records maintained by an agency. Accordingly, we conclude that except in extraordinary situations not present here, an agency must disclose, upon request by any person, the identity of individuals who have requested to inspect or copy government records under the freedom of information provisions of part II of the UIPA.

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[3]This OIP Opinion Letter was addressed to "Jane Doe."

Furthermore, for the reasons stated above, we conclude that except where a request to the OIP for an advisory opinion contains information that is actually in dispute, or itself protected by a UIPA part II exception to access, the OIP shall make such requests available for inspection and copying.

Hugh R. Jones
Staff Attorney

HRJ:sc

APPROVED:

Kathleen A. Callaghan
Director